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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

EULALA SHUTE and RUSSEL SHUTE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

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I. THE DISTRICT COURT LACKED *IN PERSONAM* JURISDICTION

Respondents apparently agree that Carnival's contacts with the forum state—promoting its cruises and paying a commission to travel agents—are not substantively related to the cause of action here for negligence allegedly occurring aboard the ship. Respondents argue, rather, that the only constitutional prerequisite to the exercise of specific jurisdiction is the defendant's "purposeful avail-

ment" of the right to do business in the forum state. Resp. Br. at 19-20, 21-22. If this one requirement is met, Respondents contend, the burden should shift to the defendant to make "a compelling case" that jurisdiction is unreasonable in light of all the circumstances of the case. *Id.* at 23.

Respondent's position is flatly inconsistent with the requirements for specific jurisdiction as indicated by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and subsequent cases. *See* Pet. Br. at 11-13. The existence of an adequate connection between the cause of action and the defendant's contacts has not been treated "as a constitutional policy consideration," Resp. Br. at 16-17, nor can it be considered a "new" requirement, Resp. Br. at 9. Rather, this Court has long treated it as integral to specific jurisdiction; the exercise of specific jurisdiction requires both that "the defendant has 'purposefully directed' his activities at residents of the forum" *and* that "the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (*quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) and *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 (1984)).[1]

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[1] Thus, Respondents' reliance on *Burger King* and *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) is misplaced. *Burger King* was a contract action, where the contract had been entered into and partly performed in the forum state. 471 U.S. at 480. "[W]here individuals 'purposefully derive benefit' from their interstate activities . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise *proximately* from such activities . . . ." *Id.* at 473-74 (citation omitted) (emphasis added). *McGee* was also a contract action, under which defendant owed plaintiff a duty to provide a service—life insurance protection of an individual resident—in the forum state. In *Burger King* and *McGee*, the dispute "grew directly out of 'a contract which had a *substantial* connection with that State.'" *Burger King*, 471 U.S. at 479 (quoting *McGee*, 355 U.S. at 223) (emphasis in original).

Respondents would have this Court either jettison or severely eviscerate the second of the two requirements.[2] The existence of both requirements is fully justified, however, because they generally serve different purposes. The requirement of purposeful direction primarily serves to permit jurisdiction only where it is reasonably foreseeable, and thus reduces the element of unfair surprise to a nonresident in being subjected to long-arm jurisdiction. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The requirement of relatedness, on the other hand, primarily serves to permit jurisdiction only where the forum state has a sufficient interest in deciding the case. As we noted in our opening brief, this Court explained in *International Shoe* that long-arm jurisdiction is consistent with due process because, and "so far as," it enforces "obligations [that] arise out of or are connected with the activities within the state." 326 U.S. at 319. *See* Pet. Br. at 12.

Respondents' position also disregards the distinction between specific and general jurisdiction. General jurisdiction exists when the defendant's activities in the forum state are sufficiently continuous and systematic to make the assertion of *in personam* jurisdiction reasonable; the forum state can then exercise general jurisdiction over the defendant notwithstanding the lack of a connection between the activities and the cause of action. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952). General jurisdiction may be viewed in this regard as

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[2] As noted in our petition for certiorari, this Court's recent decisions have indeed focused on the requirement of purposeful availment. Pet. at 7-8. This is not because it is more important than the second requirement of a substantive relationship, but because the second issue was not presented for decision in those cases. *See, e.g., Helicopteros*, 466 U.S. at 415 & n.10.

analogous to jurisdiction based upon personal presence. *See* Pet. Br. at 11 n.10. By weakening the requirement for specific jurisdiction that the cause of action arise out of or relate to the defendant's contacts, Respondents' position would effectively eliminate specific jurisdiction as a distinct form of jurisdiction and expose nonresident corporations to a panoply of litigation in jurisdictions where their contacts are in no way tantamount to physical presence.[3]

Respondents suggest that, "[t]o the extent the connection between the cause of action and the defendant's contacts has been examined, courts have implictly adopted what can be called a sliding scale approach." Resp. Br. at 14 (*citing* Richman, *A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction (Part II)*, 72 Calif. L. Rev. 1328 (1984)). Yet Respondents cite no judicial authority for such an approach, let alone authority from this Court. In any event, a "sliding scale" for specific jurisdiction would be utterly unworkable and, if adopted by this Court, would leave lower courts with no guidance in deciding whether jurisdiction is proper. Respondents do not suggest how courts should go about weighing "defendant's forum contacts" against "the connection between those contacts and the plaintiff's claims." Richman, *supra*, at 1345. For that matter, Respondents do not even give any reason why jurisdiction over Carnival would be proper under the test they propose. Here, both sides of the "sliding scale" weigh against

[3] The swallowing of specific jurisdiction by general jurisdiction would be particularly ironic in light of the fact that the "minimum contacts" test was announced by this Court in *International Shoe*, a specific jurisdiction case. When the Court later indicated in *Perkins* that general jurisdiction was constitutional under some circumstances, it repeatedly noted the "arising out of" proviso of *International Shoe* and observed that "[t]he instant case takes us *one step further* to a proceeding in personam to enforce a cause of action not arising out of the corporation's activities in the state of the forum." 342 U.S. at 444-46 (emphasis added).

jurisdiction: defendant's contacts with the forum state are limited to the promotion of services that take place entirely outside the forum, and those contacts are related tenuously, at best, to the cause of action.

For the reasons set forth in Petitioner's opening brief, the "but for" test employed by the Court of Appeals is no more satisfactory than the "sliding scale" test presented by Respondents. *See* Pet Br. at 15-20. The extent to which the "but for" test would expand specific jurisdiction—contrary to the precedents of this Court requiring a nexus between the contacts and the cause of action—is further illustrated by *Kulko v. Superior Court*, 436 U.S. 84, 93 (1978). In that action, the plaintiff had sued her former husband, a New York resident, in California. Plaintiff sought to establish a Haitian divorce decree as a California judgment, to obtain full custody of their children, and to obtain an increase in child support. *Id.* at 88. Because plaintiff and defendant had married in California, defendant's contacts with that state were arguably a "but for" cause of the action. Nonetheless, this Court held that where plaintiff and defendant married in California "and thereafter spend their entire married life in New York, the fact of their California marriage by itself cannot support a California court's exercise of jurisdiction" over a spouse who was a New York resident at the time of the suit. *Id.* at 93.

The inadequacy of the "but for" test is particularly clear in a case such as this one, where the injuries alleged did not even occur in the forum state. This Court has observed that the foreseeability of causing injury in the forum state "is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (*quoting World-Wide Volkswagen*, 444 U.S. at 295). Even if the foreseeability of causing injury in the forum state were sufficient, that would not aid Respondents; here, no defective product was sent into the forum state, and no injury occurred there.

Respondents' analysis also errs in two other respects: first, as to the balancing of the interests of different states, and second, as to the role of "economic and technological advances." Respondents argue that "[t]he interests of Washington in providing a forum for its own injured citizens to recover for their injuries is a legitimate state interest, and it far exceeds the rather nebulous interests of Florida . . . ." Resp. Br. at 10. Yet it is not clear why Washington's interest in providing a forum for its plaintiffs must outweigh Florida's interest in providing a forum for its defendants, and if Washington for some reason did have a comparatively stronger interest, that could not independently justify the exercise of *in personam* jurisdiction. As noted by the Court in *Kulko*, California's "substantial interests in protecting resident children and in facilitating child-support actions on behalf of those children . . . simply do not make California a 'fair forum' . . . ." 436 U.S. at 100 (citation omitted).

Moreover, requiring that independent weight be given to interests of the forum state in determining the existence of jurisdiction would thrust upon lower courts the unguided and unreviewable task of ascertaining how much weight a forum state's interest is due and whether that interest outweighs other factors pointing against jurisdiction, including interests of other states. Like the "sliding-scale" test, this weighing would essentially take the doctrine out of personal jurisdiction doctrine and make litigation over these issues wholly unpredictable.

Respondents cite the Court's statement in *World-Wide Volkswagen* that "the historical developments [in transportation and communication] noted in *McGee* have only accelerated in the generation since that case was decided." Resp. Br. at 11. Respondents contend that "the acceleration of economic and technological changes mentioned in *World-Wide Volkswagen* have continued to quicken since that decision and must be considered in this decision." *Id.* Apparently, Respondents would have this Court make the

standards for personal jurisdiction continually ratchet downward with the passage of time. That view erroneously assumes the due process limitations on personal jurisdiction to be based solely on convenience. What personal jurisdiction requires is not convenience, however, but legitimacy. In *World-Wide Volkswagen*, beginning with the very next sentence after the one quoted by Respondents, this Court made that distinction clear:

> Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of States was foreseen and desired by the Framers. . . . But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

444 U.S. at 293.[4]

It should also be noted that Respondents' contention as to the effect of economic and technological progress stands in stark contrast to the argument they make elsewhere regarding the burdensome nature of the forum selection clause. To the extent that developments in transportation and communication have made out-of-state litigation more feasible for defendants in the period since this Court decided *World-Wide Volkswagen*, they have

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[4] *See also Hanson v. Denckla*, 357 U.S. 235, 251 (1958) ("But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.").

also made out-of-state litigation more feasible for plaintiffs in the period since this Court decided *The Bremen*.[5] As the following section will discuss, Respondents' arguments against enforcement of the forum selection clause have no more merit than their jurisdictional arguments.

II. THE FORUM SELECTION CLAUSE IS VALID

In *The Bremen*, this Court held that "the forum clause should control absent a strong showing that it should be set aside." 407 U.S. at 15. The Court stated that the party seeking to avoid the clause must "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.*

Respondents argue that *The Bremen* should, in effect, be limited to its facts. It is true that the Court in *The Bremen* referred to the fact that the clause before it was in a negotiated international commercial transaction, *id.* at 17, but nothing in the opinion indicates that its holding was limited to that context. On the contrary, the Court stated that even where the parties chose such a remote forum as to suggest that "the agreement was an adhesive one," the rule is still that "the party claiming should bear a heavy burden of proof." *Id.* at 17.

While conceding that the clause here was reasonably communicated, Resp. Br. at 26, Respondents argue that it should not be enforced for various reasons. Respondents iterate the position of the court of appeals that the ticket is unenforceable because Carnival had greater bargaining power, a position that seemingly renders all forum selection clauses (and possibly other clauses) in a form ticket contract *per se* unenforceable. As discussed in Petitioner's opening brief, however, a party cannot be

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[5] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*").

considered to have "overweening"[6] bargaining power within the meaning of *The Bremen* simply because a form consumer contract is involved. *See* Pet. Br. at 27-29.[7]

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[6] 407 U.S. at 12. Respondents erroneously state, in this regard, that the ticket contract prevents refunds in the event a passenger objects to the forum selection clause. Resp. Br. at 28. Paragraph 16(a) of the ticket contract forbids refunds for unused tickets after a cruise, but the brochure provided to prospective passengers makes clear that refunds are available to passengers who cancel a reasonable period before the cruise. The brochure is Exhibit D to the Hinrichs Affidavit, CR-16. The Shutes received the brochure. *See* Shute Declaration, ¶ 5, J.A. 11; Hinrichs Affidavit, ¶ 7, J.A. 14.

The final page of the brochure, captioned "General Information," states that a seven-day cruise (such as the one taken by Respondents) can be cancelled between 16 and 45 days before sailing with a $100 penalty, and between 3 and 15 days before sailing with a $200 penalty. The brochure advises "the purchase of trip cancellation insurance from your travel agent."

Sample copies of the terms and conditions are available to any passenger or travel agent upon request. *See Carnival Cruise Lines, Inc. v. Superior Court*, 222 Cal. App. 3d 1548, 272 Cal. Rptr. 515, 519 (1990).

[7] The Seventh Circuit, in *Northwestern National Ins. Co. v. Donovan*, 916 F.2d 372 (7th Cir. 1990) (Posner, J.), recently upheld the enforceability of a forum selection clause in a non-maritime form contract. There, the defendants sought to have the clause held invalid. The court of appeals noted the importance and pervasiveness of form contracts: "Ours is not a bazaar economy in which the terms of every transaction, or even of most transactions, are individually dickered; even where they are, standard clauses are commonly incorporated in the final contract, without separate negotiation of each of them." *Id.* at 377. The court squarely rejected the proposition that the status of a contract as a form contract renders a forum selection clause unenforceable. *Id.*

Further, the court pointed out that any inconvenience imposed upon defendants was not "gratuitous"—"(if the cases ever go to trial, which most do not)"—in that the inconvenience to defendants of trying the case in the contractual forum was mirrored by the inconvenience to plaintiffs of trying the case in a noncontractual forum. *Id.* at 378. In a competitive market, these cost savings

Respondents also characterize Florida as an "unreasonable and illogical forum," Resp. Br. 30, disregarding the fact that Carnival's head office, its legal department, its passenger claims processing department, and its records concerning its employees and the maintenance of its vessels are all located in Florida.[8] At any rate, Respondents limit the inquiry tendentiously by considering the convenience or inconvenience generated by the clause only as it operates in this particular case and by demanding that the clause be held reasonable only if it is tailored precisely to the facts presented here. A forum selection clause in a form contract necessarily must cover a variety of factual situations, and so the clause should be evaluated *ex ante* on the basis of whether it is reasonable in light of the range of those situations. Here, most Carnival ships have normally operated out of ports in Florida or the Caribbean, and the contractual forum reflects that fact.[9]

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from an enforceable forum selection clause would be enjoyed by plaintiff's customers, including defendants, so "the defendants were compensated in advance for bearing the burden of which they now complain, and will reap a windfall if they are permitted to repudiate the forum selection clause." *Id.*

The court suggested that the result in *Shute* may have been justifiable under its facts, *id.* at 376, but that suggestion was made without any analysis of, and possibly without any awareness of, the cases of this Court and the courts of appeals that have upheld printed conditions (including forum selection clauses) in maritime and non-maritime passenger tickets. *See* Pet. Br. at 21-24.

[8] *See Carnival Cruise Lines, Inc. v. Superior Court*, 272 Cal. Rptr. at 519.

[9] *Id.* Respondents apparently concede that Florida would be a reasonable forum for accidents occurring on cruises that originated from that state. *See* Resp. Br. at 31-31. However, it is difficult to predict at the time of a cruise where the particular vessel may be sailing months or years later when an injury claim is litigated. Thus, it was reasonable for Carnival to designate Florida as the forum for all claims, including those arising on cruises originating from other locations.

Further, *The Bremen* specifically indicated that a mere finding that "the balance of convenience" favors a non-contractual forum "falls far short of a conclusion that [a party] would be effectively deprived of its day in court. . . ." 407 U.S. at 18; *The Bremen* also approved the use of depositions as an adequate means of obtaining testimony from witnesses who cannot be sent to the contractual forum, *id.* at 19. The rule in *The Bremen* that a forum selection clause cannot be overturned on the basis of the "balance of convenience" has a sound basis not only in the normal respect for contracts, but also in the need for predictability in determining where cases can be litigated. *See id.* at 13.[10] To make the enforceability of a forum selection clause depend on a multi-factor *forum non conveniens*-type balancing test, as Respondents would do, is to deny the efficiency and predictability that such clauses are designed to achieve.

Finally, Respondents argue that the clause is unenforceable under 46 U.S.C. § 183c as a provision "purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damage therefor." The clause does not, however, purport to take away Respondents' right to a trial by a court. *See* Pet. Br. at 33-35. Respondents do not refer to any record evidence for their assertion that the clause was intended to deprive passengers of the ability to pursue meritorious claims, Resp. Br. at 31, 34, nor could they do so. The forum selection clause in this case,

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[10] The difficulties inherent in the "balance of convenience" inquiry that Respondents would have the courts make is illustrated by Respondents' characterization of *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988), *cert. dismissed*, 109 S. Ct. 1633 (1989). Many would consider a forum selection clause requiring U.S. ticket purchasers to sue in Italy—as did the clause in *Hodes*—to be considerably more burdensome, and less reasonable, than a clause requiring suit in Florida. Yet Respondents come to the opposite conclusion. *See* Resp. Br. at 31.

like the limitation procedure established by 46 U.S.C. § 185, *see* Pet. Br. at 30 n.28, serves the legitimate purpose of setting forth a single forum where potentially numerous claims can be litigated.[11]

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded to be dismissed for lack of jurisdiction over the person or, in the alternative, dismissed or transferred pursuant to 28 U.S.C. § 1406(a).

Respectfully submitted,

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[11] Respondents quote a statement in *Just v. Chambers*, 312 U.S. 383 (1941) that the Limited Liability Act was intended "'to afford an opportunity for the determination of claims against the vessel and its owner.'" Resp. Br. at 34 (*quoting Just*, 312 U.S. at 385). Actually, the provision at issue there was the procedure set forth by the Act permitting vessel owners to limit their liability. The full text of the quoted sentence in *Just* is as follows: "The statutory provision for limitation of liability, enacted in the light of the maritime law of modern Europe and of legislation in England, has been broadly and liberally construed in order to achieve its purpose *to encourage investments in shipbuilding* and to afford an opportunity for the determination of claims against the vessel and its owner." (Emphasis added.)